IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6941 OF 2006

Chandrakant Sadashiv Nagarkar
& Ors. .. Petitioners.

vs.

Ramnarayan Gopaldas Bairagi
& Ors. .. Respondents.

Mr. Ajay A. Joshi for petitioners.
Mr. Umesh Mankapure for Respondent No. 4.

CORAM : A.P. DESHPANDE, J.

DATE : 17th November, 2006.

P.C.

. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The petitioners claim a right to perform pooja at the Samadhi of Brahmanand Maharaj. The purchaser of the property from the respondent no. 1 who is on of the trustees, objected to the performance of pooja by the petitioners and hence plaintiffs instituted a civil suit for perpetual injunction. In the said suit the defendants raised a preliminary objection to the maintainability of

the suit by contending that jurisdiction of civil court is barred by Section 80 of the Bombay Public Trust Act and no civil suit can be instituted without seeking prior permission of the Charity Commissioner under Section 50 and 51 of the BPT Act. Other objection also seems to have been raised and the same is to the effect that there is an efficacious remedy available to the petitioners to be invoked under the Bombay Public Trust Act and to be precise by taking recourse to Section 43 (E) of the Act. The trial Court framed a preliminary issue by passing an passed an order dated 21.8.2006. The a preliminary issue reads thus :-

> "Whether the Court has jurisdiction to try and entertain the suit?"

It is obvious that the said issue has been framed having regard to Sections 50, 51 and 80 of the BPT Act. Section 41 (E) has no bearing on the said issue. Existence of efficacious remedy under some other Act cannot oust the jurisdiction of the civil court.

3. The learned counsel for the petitioner has objected to the order mainly to the extent of the observations made in para 11 of the order wherein the trial Court concludes by observing thus :-

"Therefore there is substance in the argument and in the contention of the defendants that this court have no jurisdiction."

4. The learned counsel for the petitioners states that the trial court seems to have prejudged the issue. While framing the issue it has recorded a finding that the objection raised by the defendant is well merited and the court has no jurisdiction. The leaned counsel for the respondents explains the observations by stating the the said observations are not intended to pronounce on the preliminary issue but the same seems to be passing observations of the Court which will ave no bearing on the decision of the issue with regard to the jurisdiction of the Court. I have also no doubt in my mind that the trial Court has not and the trial court cannot pronounce on the jurisdiction of the Court while passing an order of framing of a preliminary issue. The trial Court shall proceed to decide the preliminary issue of jurisdiction uninfluenced by the observations touching the merit of the matter more so which are contained in para 11 of the order. With this clarification partly allowing the petition the same is disposed of.

5. Both the learned advocates at this stage urged that the trial Court be directed to

expeditiously dispose of the preliminary issue so also the application moved by the petitioners claiming temporary injunction below Exhibit-5. I direct the trial court to decide the preliminary issue so also application at Exhibit-5 simultaneously and if it is not possible, then pass ad interim order on the Application at Exhibit-5, during the pendeny of the decision on the preliminary issue, in accordance with Law.

6. Rule is made absolute in the above terms.

(A.P. Deshpande, J.)